

## **REMARKS**

At the time the current Official Action was mailed, the Examiner rejected claims 1-7, objected to claims 8-10 as being based on a rejected base claim, and considered claims 11-14 to be allowable. By this paper, Applicants have added new claims 15-40 and amended claims 1-14 for clarification of certain features. These amendments do not add any new matter. Upon entry of these amendments, claims 1-40 are pending in the present application and are believed to be in condition for allowance. Reconsideration of the application in view of the remarks set forth below is respectfully requested.

### **Amendments to the Specification**

Applicants have deleted the first paragraph of the specification. Applicants wish to withdraw the previously claimed priority date from Application No. 10/677,742, filed October 1, 2003.

### **Claim Objections**

In the Office Action, the Examiner objected to claims 8-10 as being dependent upon a rejected base claim. The Examiner further stated that claims 8-10 would be allowable if they were rewritten in independent form and included all the limitations of the base claim. *See* Office Action, page 3. Although Applicants do not agree with the Examiner's objection, as will be discussed below, Applicants have amended claim 8 to place it in independent form, as recommended by the Examiner. Claims 9-10 are dependent upon independent claim 8. In view of this amendment, Applicants respectfully request that the Examiner withdraw the objection to claims 8-10.

### **Rejections under 35. U.S.C. § 102**

The Examiner rejected claims 1-7 under 35 U.S.C. § 102 as being anticipated by Smith (U.S. Patent Number 4,977,011, hereinafter "Smith"). Applicants respectfully traverse these rejections. Specifically, the Examiner stated:

Claims 1-7 are rejected under 35 U.S.C. 102(b) as being anticipated by Smith (497701 1).

Smith (497701 1) teaches the invention as claimed including a headband, comprising: a low stretch segment (2) sized to fit around a wearer's head; and an elastic (5) segment being smaller than said low stretch segment, said elastic segment having a free end and an attached end, said elastic segment being attached at said attached end with said low stretch segment, said free end of said elastic segment configured to form a closed loop with said low stretch segment around a wearer's head. Note the pleat is a visual indicator.

Office Action, page 2.

### ***Legal Precedent and Guidelines***

Anticipation under Section 102 can be found only if a single reference shows exactly what is claimed. *Titanium Metals Corp. v. Banner*, 778 F.2d 775, 227 U.S.P.Q. 773 (Fed. Cir. 1985). For a prior art reference to anticipate under Section 102, every element of the claimed invention must be identically shown in a single reference. *In re Bond*, 910 F.2d 831, 15 U.S.P.Q.2d 1566 (Fed. Cir. 1990). To maintain a proper rejection under Section 102, a single reference must teach each and every element or step of the rejected claim. *Atlas Powder v. E.I. du Pont*, 750 F.2d 1569 (Fed. Cir. 1984). Thus, if the claims recite even one element not found in the cited reference, the reference does not anticipate the claimed invention.

### ***The cited reference is missing features recited by independent claim 1.***

Turning to the claims, the present independent claim 1 recites, *inter alia*, “a headband, comprising ... a low stretch segment ... and an elastic segment ... having a *free end* and an *attached end*, the elastic segment being attached at the attached end with the low stretch segment, the *free end* of the elastic segment configured to *form a closed loop* with the low stretch segment around a wearer’s head.” (Emphasis added). As claim 1 clearly states, the *attached end* refers to an end of the elastic segment that is attached to the low stretch segment. The *free end* refers to an end of the elastic segment that is not attached to the low stretch segment and that is configured to form a closed loop with the low stretch segment around a wearer’s head.

In contrast, Smith does not teach or suggest that the elastic segment has a *free end* and an *attached end*, as recited by independent claim 1. Rather, Smith discloses “forming a layer of nonintersecting elastic strands, tensioning the strands, positioning the tensioned strands between two layers of breathable material, joining the layers together, and releasing the tension in the

strands and thereby permitting them to contract and draw the outer layers into pleats or shirrs.” Smith, col. 2, lines 51-57. In Smith, the elastic layer 5, formed by the elastic strands 4, does not have a free end or an attached end because both surfaces of the entire elastic layer 5 are positioned between the two layers of breathable material, or the nonwoven layers 2 and 3. Elastic layer 5 is adhered to the nonwoven layers 2 and 3 by an adhesive layer 6. Thus, the elastic layer 5 is adhered to the nonwoven layers 2 and 3 on both surfaces *throughout* the structure 1. Such a structure 1 is completely different from the headband of claim 1, where the elastic segment is attached to the low stretch segment at only *one end*.

Furthermore, Smith does not teach or suggest that the *free end* of the elastic segment is “configured to *form a closed loop* with the low stretch segment around a wearer’s head,” as recited by independent claim 1. (Emphasis added). As already discussed above, there is no *free end* in Smith. Thus, there is no free end of the elastic segment that is configured to *form a closed loop* with the low stretch segment around a wearer’s head. Rather, the elastic layer 5 is adhered to the nonwoven layers 2 and 3 *throughout* the structure 1, and there is no portion of the elastic layer 5 that is unattached to the nonwoven layers 2 and 3 and capable of forming a *closed loop* with the nonwoven layers 2 and 3. Smith teaches a structure that is completely different from the headband of claim 1. For at least these reasons, among others, Smith cannot support a *prima facie* case of anticipation of claim 1 and its dependent claims.

In view of these deficiencies, among others, Applicants respectfully request the withdrawal of the 35 U.S.C. § 102 rejections for independent claim 1 and the claims depending therefrom.

### **New Claims**

As set forth above, Applicants have added new claims 15-40. New claims 15-18 are dependent on claim 8 and are believed to be allowable because claim 8 is believed to be allowable. New claims 19-21 are dependent on claim 1 and are believed to be allowable because claim 1 is believed to be allowable. New claims 22-24 are dependent on claim 11 and are believed to be allowable because claim 11 is believed to be allowable. Furthermore, Applicants have reviewed the art of record and believe new claims 25, 33, and 38 and their dependent

claims are patentable over the cited reference and in condition for allowance. Therefore, Applicants request that the Examiner allow the new claims 15-40.

### **Conclusion**

In view of the remarks set forth above, Applicants respectfully request reconsideration of the Examiner's rejections and allowance of all pending claims. If the Examiner believes that a telephonic interview will help speed this application toward issuance, the Examiner is invited to contact the undersigned at the telephone number listed below.

### **Authorization for Extension of Time and Payment of Fees**

In accordance with 37 C.F.R. § 1.136, Applicants hereby provide a general authorization to treat this and any future reply requiring an extension of time as incorporating a request therefor. The Commissioner is authorized to charge the requisite fee of \$1,600.00 for additional claims, and any additional fees which may be required, to the credit card listed on the attached PTO-2038. However, if the PTO-2038 is missing, if the amount listed thereon is insufficient, or if the amount is unable to be charged to the credit card for any other reason, the Commissioner is authorized to charge Deposit Account No. 06-1315; Order No. TYHC:0128 / P0402S-01A / FLE.

Respectfully submitted,

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